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No. 92-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

PETER HURWITZ,

Petitioner,

vs.

JOAN LEAR SHER,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) Should the award of survivor's benefits under plans covered by the Employee Retirement Income Security Act ("ERISA") be controlled by the designation of beneficiary on file with the plan administrator?

(2) Does the extension of ERISA to nullify provisions of antenuptial agreements that expressly waive benefits arising from a previous marriage impermissibly intrude on an area of state domestic relations law?

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Other Authorities:

H. Clark, The Law of Domestic Relations in the United States, § 1.1 (2d ed. 1987) 17

IRS Pubs. Nos. 1565 and 1566, Looking Out for #2: A Married Couple's Guide to Understanding Your Benefit Choices at Retirement (1991) 23

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No. 92 -

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1992

PETER HURWITZ,

Petitioner,

v.

JOAN LEAR SHER,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

Petitioner Peter Hurwitz prays that the Court grant a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit entered on December 28, 1992 concerning the effect of the Employee Retirement Income Security Act of 1974 on an antenuptial agreement signed by petitioner's father and respondent.

OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit is reported at 982 F.2d 778 (2d Cir. 1992) and is reprinted in the Appendix to this petition, infra, at 1a-15a. The decision of the United States District Court for the Southern District of New York, reported at 789 F.Supp. 134 (S.D.N.Y. 1992) (Patterson, J.), is reprinted in the Appendix, infra, at 16a-28a.

JURISDICTION

The judgment of the United States Court of Appeals for the Second Circuit was entered on December 28, 1992. This Court has jurisdiction to review the judgment of the Court of Appeals pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS AND REGULATIONS INVOLVED

1. Section 404(a)(1)(D) of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1104(a)(1)(D), as amended, provides:

> **(a) Prudent man standard of care**
>
> (1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interests of the participants and beneficiaries and--

> (D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter and subchapter III of this chapter.

2. Section 205 of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1055(c)(2), as amended, provides:

> (2) Each plan shall provide that an election [of a waiver] under paragraph (1)(A)(i) shall not take effect unless--
>
> (A)(i) the spouse of the participant consents in writing to such election, (ii) such election designates a beneficiary (or form of benefits) which may not be changed without spousal consent (or the consent of the spouse expressly permits designations by the participant without any requirement of further consent by the spouse), and (iii) the spouse's consent acknowledges the effect of such election and is witnessed by a plan representative or a notary public.[1]

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[1] The related provision of the Internal Revenue Code, 26 U.S.C. § 417(a) (1988), mirrors this language.

3. Treas. Reg. § 1.401(a)-20 (1991) provides in pertinent part:

> Q-28 Does consent contained in an antenuptial agreement or similar contract entered into prior to marriage satisfy the consent requirements of sections 401(a)(11) and 417 [of The Internal Revenue Code]?
>
> A-28 No. An agreement entered into prior to marriage does not satisfy the applicable consent requirements, even if the agreement is executed within the applicable election period.
>
> Q-32 What rules govern a participant's waiver of the spousal benefit under section 401(a)(11)(B) [of The Internal Revenue Code]?
>
> A-32 (a) **Application.** In the case of a defined contribution plan . . . a participant may waive the spousal benefit of section 401(a)(11)(B)(iii) if the conditions of paragraph (b) are satisfied . . . .
>
> (b) **Conditions** . . . Thus, the participant's waiver of the spousal benefit must state the specific nonspouse beneficiary who will receive such benefit. The waiver is not required to specify the optional form of benefit. The participant may change the optional form of benefit, but not nonspouse beneficiary, without obtaining the spouse's consent.

STATEMENT

A. Statement of Facts:

David Hurwitz was the sole participant in the Algonquin Press, Inc. Employee Profit Sharing Plan (the "Plan"), as well as the administrator of the plan. In 1988 David Hurwitz was divorced from his second wife and designated his son from his first marriage, petitioner Peter Hurwitz, as his sole beneficiary under the Plan. His second wife consented to this designation. This designation of petitioner was the only beneficiary designation on file when David Hurwitz died, less than nine months after his third marriage. (3a, 19a).

In January of 1990 David Hurwitz married respondent Joan Lear Sher ("Sher"). Before the marriage, David Hurwitz and Sher signed an antenuptial agreement in which each spouse renounced all marital rights in the other spouse's property. The agreement provided that "each party hereby waives and releases to the other party and to the other party's heirs, executors, administrators and assigns all rights . . . which may arise by reason of the marriage between the parties and the present or future laws of any jurisdiction . . . as fully as though the parties had never been married . . . ." (3a). The agreement included a specific waiver of all rights which might arise by reason of any laws affecting the devolution of property at death, and provided for the parties to execute any further documents needed to effectuate the provisions of the agreement.

The agreement specifically identified the Algonquin Employee Profit Sharing Plan, the largest asset of David Hurwitz, as property in which Sher disclaimed any interest, and included a listing of all of the Plan's investments. Sher also released to David Hurwitz' heirs all rights in the Plan which could otherwise arise by reason of her marriage. As consideration for this waiver, David Hurwitz and his heirs disclaimed any interest in substantially greater financial investments belonging to Sher.

David Hurwitz died on October 5, 1990, less than nine months after marrying Sher. Despite her express waiver of any rights with respect to the Plan, Sher asserted a claim to the Plan and challenged the right of David Hurwitz's sole heir, Peter Hurwitz, to receive survivor's benefits under the Plan even though he was the designated plan beneficiary. On May 15, 1991, Peter Hurwitz, petitioner herein, commenced an action in New York State Supreme Court seeking a declaration that he was the sole beneficiary under the Plan. (16a). Sher removed the state court declaratory relief action to the United States District Court for the Southern District of New York pursuant to 28 U.S.C. § 1441(a) on the ground that federal law governed the disposition of the case. The federal district court had jurisdiction pursuant to 28 U.S.C. § 1331 (general federal question jurisdiction), as well as under 29 U.S.C. § 1132(e) and (f) (conferring federal jurisdiction over actions by beneficiaries of employee benefit plans). In the district court Sher filed a counterclaim asserting that her own pre-marriage release of any interest in the Plan was not

an effective release of her interest in the Plan under Section 205 of ERISA, 29 U.S.C. § 1055(c). (17a)

B. The District Court and Court of Appeals Decisions:

In the district court both parties moved for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. The district court held that the antenuptial agreement could not constitute an effective waiver of spousal rights under ERISA because it was entered into before the parties were married. (24a). It also held that the antenuptial agreement did not contain provisions that it considered necessary to constitute a waiver under Section 1055. (24a-25a). Accordingly, it granted Sher's motion declaring her to be the sole beneficiary under the Plan. (28a).

The Court of Appeals did not decide the question of whether an antenuptial agreement could be rendered ineffective as a waiver of ERISA rights solely because it was entered into before marriage. (8a). Despite Sher's clear release of any interest in David Hurwitz' pension plan rights, the Court of Appeals held that the antenuptial agreement was ineffective. (8a-10a). Although ERISA has no provision dealing with the effects of antenuptial agreements on retirement plans that pre-date a marriage, the Court of Appeals assumed that the spousal protection provisions of Section 1055 that pertain to pension plans created during marriage should be applied. (7a). The Court of Appeals dis-

regarded entirely the plan participant's designation of Peter Hurwitz as the beneficiary of the Plan. The Court of Appeals erroneously interpreted the statute as requiring the antenuptial agreement to name the alternate beneficiary, even though Section 1055(c)(2)(A)(ii) sanctions general consent to beneficiary designations by a plan participant. In reaching its decision the Court of Appeals also relied upon regulations issued by the Internal Revenue Service which state that an antenuptial agreement can never constitute a waiver of employee benefit plan rights under ERISA. (11a-13a). Finally, despite the provision of the agreement in which Sher agreed to execute any further documents necessary to carry out the intent of the agreement, the Court of Appeals declined to order Sher to execute a document waiving Plan benefits in order to give effect to her release in the antenuptial agreement. (14a-15a).

REASONS FOR GRANTING THE WRIT

I. This Court Should Resolve the Conflicts in Principle that Exist Between the Decisions of the Second, Sixth and Seventh Circuits

The decision below conflicts in principle both with the Sixth Circuit's decision in McMillan v. Parrott, 913 F.2d 310 (6th Cir. 1990) and with the Seventh Circuit's decision in Fox Valley & Vicinity

Constr. Workers Pension Fund v. Brown, 897 F.2d 275 (7th Cir.) (en banc), cert. denied, 498 U.S. 820 (1990). While the Sixth Circuit examines only the documents on file with a benefit plan administrator to determine whether or not there has been an effective waiver of spousal benefits, the Second and Seventh Circuits disregard altogether the beneficiary designations on file with plan administrators. These conflicts warrant review by this Court because of the uncertainty that administrators of ERISA plans are subject to in determining which claimants are entitled to receive retirement plan benefits.

In McMillan the Court of Appeals for the Sixth Circuit held that a designation of beneficiary on file with the plan administrator controlled the disposition of a pension plan, notwithstanding waiver terms in a divorce agreement by which each spouse relinquished "any and all" claims to the property of the other spouse. In McMillan the plan participant's ex-wife had been designated as the plan beneficiary before her divorce from the participant. 913 F.2d at 311. The designation naming her as the plan beneficiary in the event of the participant's death was not changed for four years after the divorce. During this period the participant remarried. After his death his then-spouse claimed a survivor benefit under his retirement plan, asserting that in the divorce the prior wife waived any rights under the plan. The Court of Appeals ruled against the current spouse because the first spouse was still designated as the beneficiary in the forms filed with the plan administrator.

The Sixth Circuit based its ruling on ERISA's requirement, codified in 29 U.S.C. § 1104(a)(1)(D) (1988), that a plan administrator must discharge his duties "in accordance with the documents and instruments governing the plan . . . ." Holding that this provision (rather than Section 1055) was controlling, the court held that the outstanding designation of beneficiary naming the first wife was controlling and declined to give effect to the waiver in the subsequent divorce agreement. 913 F.2d at 312. Citing Judge Easterbrook's dissenting opinion in Fox Valley, the Sixth Circuit concluded that exclusive reliance on the plan documents best fulfilled Congress' intent that ERISA plans be "uniform in their interpretation and simple in their application." Id.[2] The Court of Appeals for the Eighth Circuit in Lyman Lumber Co. v. Hill, 877 F.2d 692 (8th Cir. 1989) also rejected a waiver of benefits in a divorce decree where a designation of beneficiary had not been changed following a divorce. Citing state common law pertaining to insurance policy beneficiaries, the Eighth Circuit held the waiver in the divorce decree ineffective because it did not revoke the earlier beneficiary designation. See 877 F.2d at 691-92.

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[2] The Sixth Circuit recently adhered to this approach in its unpublished opinion in Howard v. Branham & Baker Coal Co., 968 F.2d 1214 (table), No. 91-5913, 1992 U.S. App. LEXIS 16247 (6th Cir. 1992), in which it rejected a waiver in an antenuptial agreement and held that filing of a new designation of beneficiary form was necessary to change beneficiaries.

In Fox Valley, however, the treatment of a designation of beneficiary by the Seventh Circuit was the opposite of that in McMillan. In Fox Valley, as in McMillan, a designation of beneficiary form naming the spouse remained unchanged and on file with the plan administrator after a divorce. The divorce agreement provided for waiver of each spouse's interest in the other spouse's retirement and pension plans. The Court of Appeals for the Seventh Circuit, sitting en banc and over the dissent of four judges (including Judge Easterbrook), ruled that the designation of beneficiary in the plan documents was not controlling and gave effect to the waiver in the divorce decree. 897 F.2d at 280-82. The dissenting judges emphasized the value of rules requiring payment of benefits to designated beneficiaries for achieving "simple administration" and rapid payment of benefits. 897 F.2d at 283.

In the case below the Court of Appeals for the Second Circuit failed altogether to address the designation form naming petitioner as the plan beneficiary. The Plan provided for the death benefit to be payable to the designated beneficiary as long as the participant's spouse had waived the right to be the beneficiary. Had the Second Circuit adopted the Sixth Circuit's approach and given controlling effect to the beneficiary designation pursuant to Section 1104(a)(1)(D), it would have held for petitioner instead of respondent, as the only beneficiary designation on file named Peter Hurwitz as the beneficiary. Although the court below expressed concern for ease of administration, its decision prevents plan ad-

ministrators from relying on beneficiary designations on file. Unless a national rule is established governing whether beneficiary designations or other documents that expressly waive plan benefits are controlling in determining who is a beneficiary, conflict in the administration of ERISA-governed plans will continue in accordance with the widening split of authority in the different circuits.

While the Seventh Circuit's decision in Fox Valley and the decision of the Second Circuit in this case both disregarded the existence of a designation of beneficiary, they are nonetheless in conflict with each other with respect to the requirements for waiver of spousal benefits under ERISA. In Fox Valley the court approved and gave effect to the waiver of spousal benefits in the parties' divorce agreement, even though that waiver did not contain the terminology of Section 1055(c)(2). The spouse's waiver in the Fox Valley divorce decree did not identify any alternate beneficiary and did not "acknowledge the effect" of the waiver. See 897 F.2d at 277. Nonetheless, the Court of Appeals for the Seventh Circuit gave effect to the waiver, holding not only that "ERISA allows beneficiaries to waive their interests in benefits", but also that "ERISA is silent on what constitutes a proper waiver" in a divorce decree. 897 F.2d at 279, 280. Unlike the Second Circuit, the Seventh Circuit did not consider the waiver requirements of Section 1055 to be applicable, even though the waiver was negotiated during the marriage, was signed by a spouse, and pertained to benefit rights earned during the marriage.

The court below sought to distinguish Fox Valley on the grounds that a "divorced spouse, unlike a current spouse, is not protected by the explicit terms of the statute." (14a). The purported distinction is unpersuasive at best and does not resolve the conflict between the circuits. Prior to marriage a prospective marriage partner who signs an antenuptial agreement is also not a spouse. Under this reasoning the statute is inapplicable to waivers made before marriage. Morever, notwithstanding a divorce, a divorced spouse who has contributed to the marriage that resulted in a pension plan is clearly within the class of persons whom Congress sought to protect. See Part II-A, infra.

Thus the Second Circuit's decision cannot be reconciled with the Seventh Circuit's opinion in Fox Valley. The core difference between the two decisions is that the Second Circuit and the Seventh Circuit have adopted sharply differing standards for an effective waiver of employment plan benefits. Certiorari should be granted to determine whether the Second Circuit's cramped interpretation of Section 1055 waiver provisions or the Seventh Circuit ruling accepting alternate forms of waiver best reflects Congressional intent in Section 1055.

II. The Court Below Decided an Important Question of Federal Law That Should Be Settled by This Court

The court below addressed a question of federal law that has not been decided by this Court, namely, whether ERISA nullifies antenuptial agreements by which a prospective spouse waives a right to employment plan benefits that the other spouse has earned before the marriage. Although presented with an antenuptial agreement that met the statutory requirements for waiver of a spousal interest in survivor's benefits under an employee benefit plan, the Court of Appeals erroneously denied effect to the antenuptial agreement on the ground that it did not contain the precise waiver terms set forth in ERISA. Under the interpretation of ERISA adopted both by the court below and by other lower federal courts, the ability of prospective spouses to keep their respective pension fund assets separate through antenuptial agreements is undermined. Since antenuptial agreements concerning property are enforceable in all state jurisdictions,[3] certiorari should be granted in

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[3] The Uniform Antenuptial Agreement Act has been adopted in the following state jurisdictions: Arizona (Ariz. Rev. Stat. §§ 25-201 to 25-205 (1991)); Arkansas (Ark. Code Ann. §§ 9-11-401 to 9-11-413 (Michie 1987)); California (Cal. Civ. Code §§ 5300-5317 (West 1985)); Hawaii (Haw. Rev. Stat. §§ 572D-1 to 572D-11 (1987)); Illinois (Ill. Ann. Stat. ch. 40, ¶¶

order to review whether ERISA should be interpreted in a manner which sweeps aside the domestic relations laws of fifty states.

A. The Statute Does Not Address Benefit Plan Waivers in Antenuptial Agreements

ERISA is silent with respect to the effect of provisions in antenuptial agreements that provide for

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2601-2611 (Smith-Hurd 1989)); Iowa (Iowa Code Ann. §§ 596.1 to 596.12 (West 1991)); Kansas (1988 laws, ch. 204; no statutory citation); Maine (Me. Rev. Stat. Ann. tit. 19, §§ 141-151 (West 1987)); Montana (Mont. Code Ann. 40-2-601 to 40-2-610 (1987)); Nevada (Nev. Rev. Stat. 123A.010 - 123A.100 (1989)); New Jersey (N.J. Stat. Ann. 37:2-31 to 37:2-41 (West 1988)); North Carolina (N.C. Gen. Stat. §§ 52B-1 to 52B-11 (1987)); North Dakota (N.D. Cent. Code 14-03.1-01 to 14-03.1-09 (1985)); Oregon (Or. Rev. Stat. 108.700 to 108.740 (1987)); Rhode Island (R.I. Gen. Laws §§ 15-17-1 to 15-17-11 (1987)); South Dakota (S.D. Codified Laws §§ 25-2-16 to 25-2-25 (1989)); Texas (Tex. Fam. Code Ann. §§ 5.41 to 5.56 (West 1987)); and Virginia (Va. Code Ann. §§ 20-147 to 20-155 (1985)). In addition, all other jurisdictions recognize and enforce antenuptial agreements concerning property rights as part of their common law tradition. See Schultz, Contractual Ordering of Marriage: A New Model for State Policy, 70 Calif. L. Rev. 204, 285 (1982); see, e.g., Gentry v. Gentry, 798 S.W.2d 982 (Ky. 1990); Panossian v. Panossian, 172 A.D.2d 811 (2d Dept. 1991).

a waiver of an interest in benefits under an employee benefit plan that belongs to the other prospective spouse before marrige. Accordingly, it is appropriate for federal courts to fashion federal common law rules in determining the effect of waivers of retirement plan benefits in antenuptial agreements. Amato v. Bernard, 618 F.2d 559, 567 (9th Cir. 1980).

The court below, however, elected to apply in the premarital context waiver requirements that Congress enacted for already-married spouses. In 1984 Congress amended ERISA to provide for automatic survivor's benefits for spouses of vested participants in retirement plans. 29 U.S.C. § 1055 (1988), as amended by Pub.L. 98-397, 98 Stat. 1429. The purpose of this legislation was to protect the benefit rights of surviving spouses who made a contribution during marriage from loss of benefits under plans built up during a marriage. S. Rep. No. 575, reprinted in 1984 U.S. Code Cong. & Admin. News [USCCAN], at pp. 2547 & 2558. Congress also provided that such benefits could be waived by the spouse. 29 U.S.C. § 1055(c)(2) (1988). It required that a waiver of these benefits by a spouse "acknowledge the effect" of the waiver and include either the designation of an alternate beneficiary, or a general consent to further designations of beneficiaries by the plan participant. Id.

The court below erroneously applied the waiver requirements of this statute to antenuptial agreements even though such agreements are not referred to in the statute. The principal purpose of

antenuptial agreements is to ensure continued control by the respective spouses over the property that each has acquired prior to marriage. H. Clark, The Law of Domestic Relations in the United States, § 1.1, at 41 (2d ed. 1987). Prospective spouses who were not married to a participant in a benefit plan do not fall in the class of individuals whom Congress wished to protect in amending Section 1055. There is no indication in the statute (or elsewhere) that Congress intended to preclude prospective spouses from providing in antenuptial agreements that all of their respective property interests, including pension and benefit plan interests, would remain separate property not available to the other spouse. The opinion below erred in extending Section 1055 to be applicable to circumstances to which Congress did not contemplate its application.

In addition, the court below failed to recognize that if the statute is held applicable to antenuptial agreements, an interpretation of its provisions that is consistent with the Congressional purpose permits the general waiver that characterizes the subject antenuptial agreement. Although it should be abundantly clear that an antenuptial agreement can satisfy Congress' concerns whether or not it contains the precise terminology found in Section 1055, the court below effectively insisted on literal compliance with the terminology of the statute. The antenuptial agreement in the instant case readily fulfilled the requirements of the statute. Although it does not recapitulate the language of the statute, it is an

absolutely clear and knowing release of any and all rights that might otherwise flow from the Plan.

Respondent had the benefit of detailed disclosure, in writing, of all of the investments by the Plan. She was aware of the total dollar amount of the Plan, in which David Hurwitz was the sole participant, and expressly agreed to waive all marital rights of any kind that might at any time arise with respect to the Plan "as fully as though the parties had never married . . . ." While the benefits being waived were not formally identified as "survivor's benefits", this was immaterial since the agreement specified that respondent would have no property interest at all in the profit-sharing plan. The statute does not require a verbatim recital of its provisions; it requires that respondent show that she understands and accepts the decision to waive benefit rights. Respondent cannot contend that the agreement failed to disclose the scope of her waiver.[4]

Indeed, no stronger acknowledgement of the effect of the waiver can be imagined than the express statement, in a document that specifically included a

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[4] Respondents argued below that David Hurwitz was advised in 1988 when he designated petitioner as his beneficiary that a new spouse would have benefit rights unless she also waived such rights. The 1988 notice to David Hurwitz is not material, since the provisions of the antenuptial agreement expressly waived those rights.

list of Plan's assets, that respondent would have no marital rights in any of David Hurwitz' assets. In In re Estate of Hopkins, 214 Ill. App.3d 427, appeal denied, 141 Ill.2d 542 (1991), the court held that an antenuptial agreement that included an employee retirement plan in a schedule of spousal property being released was an effective waiver of benefit rights, even though the agreement did not specifically include the terms "benefits" or "beneficiary" in its description of the property rights being waived. By failing to uphold the equally clear waiver in the instant antenuptial agreement, the court below permitted a party who had knowingly waived all rights to her prospective husband's assets -- while protecting her own more substantial property -- to dishonor her own agreement and reap the benefit of a windfall, at the expense of the designated plan beneficiary.

Similarly, the antenuptial agreement constituted a general consent by Sher to David Hurwitz' designation of Plan beneficiaries. The agreement left each spouse full power to dispose of his or her property (which, as noted, was identified in the agreement) to his and her respective heirs. This provision of the agreement fully complied with the intent of Section 1055(c)(2)(A)(ii) to permit a spouse to give general consent to designation of alternate beneficiaries by a plan participant. In this subsection Congress contemplated that a spouse could expressly give general consent to "designations by the participant without any requirement of further

consent by the spouse" (id.) -- language which the court below failed to apply in interpreting the statute.

The effect of ERISA on antenuptial agreements waiving an interest in a spouse's pension plan or employee benefit plan is a matter of recurring concern in the lower federal courts, as well as in the state courts. See, e.g., Howard; Callahan v. Hutsell, Callahan & Buchino, P.S.C. Revised Profit Sharing Plan, 1992 U.S. Dist. LEXIS 20772, 20773 (W.D.Ky. 1992), appeal pending, Nos. 92-5796 et al. (6th Cir.); Nellis v. Boeing Co., 1992 U.S. Dist. LEXIS 8510 (D.Kan. 1992); Zinn v. Donaldson Co., Inc., 799 F.Supp. 69, 73 (D.Minn. 1992); In re Estate of Hopkins, supra. These plans often involve very substantial sums of money. The closely related issue of the enforceability of spousal benefit waivers in divorce settlement agreements as a result of Section 1055 has also occupied the attention of the federal courts of appeal. Compare Fox Valley, supra (upholding waiver of retirement plan rights in divorce settlement) with McMillan, supra (invalidating waiver of benefit plan rights in divorce settlement which did not refer to plan) and Lyman Lumber Co., supra (holding that divorce decree was not a waiver of wife's interest in ERISA-covered plan).

The application of Section 1055 to antenuptial agreements and the literal compliance with its provisions insisted upon by the court below undermines important domestic relations policies embodied in antenuptial agreements, despite the absence of any indication that Congress intended to supersede

these agreements by federal law. This Court has repeatedly held that federal courts should not disturb state family property law unless absolutely required to do so in order to preserve an express and clearly enunciated federal policy. Hisquierdo v. Hisquierdo, 439 U.S. 572, 581 (1979); United States v. Yazell, 382 U.S. 341, 352 (1966). The enforceability of the provisions of otherwise valid antenuptial agreements that pertain to spousal rights under employee benefits plans turns upon the applicability of Section 1055 to those agreements. Under the decision below, even a promise in an antenuptial agreement to execute documents necessary to give effect to the waivers in the agreement is unenforceable. As a result, negotiation of antenuptial agreements concerning the disposition of ERISA-covered assets is not feasible. Even if the statute is held to be applicable to antenuptial agreements, this Court should resolve the question of whether it must be given a rigid interpretation that vitiates antenuptial agreements whose intent clearly complies with the statutory purpose, but whose provisions do not contain textual provisions identical to those used by Congress in the statute.

B. The Internal Revenue Service Regulations Do Not Constitute a Reasonable Interpretation of the Statute

The court below both accepted and relied upon Treasury Regulations which flatly exclude antenuptial agreements from ever satisfying the consent requirements for a waiver of spousal benefits. See

Treas. Reg. § 1.401(a)-20 (1991), at "A-28" ("An agreement entered into prior to marriage does not satisfy the applicable consent requirements . . . ."). Although antenuptial agreements are recognized in all fifty states, according to this regulation all antenuptial agreements that specify the disposition of pre-existing pension and profit-sharing plans are invalid for these assets. This blanket rejection of antenuptial agreements is not based on any language in Section 1055, which is entirely silent as to the subject of such agreements. The regulation should not be given weight because it constitutes a drastic interference with the states' powers to regulate domestic relations where the words of the statute do not require such interference. Hisquierdo, supra.

Similarly, Question and Answer 32 (p.2 supra) of the regulations is inconsistent with the statute because it fails to permit general consent by a spouse to further designations of beneficiaries. See 29 U.S.C. § 1055(c)(2)(A)(ii). This portion of the regulation is at odds not only with the statute, but with IRS publications that do recognize that the statute permits general spousal consent to beneficiary designations by plan participants. IRS Pubs. No. 1565 and 1566, Looking Out for #2: A Married Couple's Guide to Understanding Your Benefit Choices at Retirement (1991) [published in two versions], at 29 and 25 (respectively).

Moreover, the blanket rejection of antenuptial agreements in these regulations fails to acknowledge that these agreements frequently contain the func-

tional equivalent of the waiver provisions in Section 1055. In In re Estate of Hopkins the court held that the Treasury regulation denying effect to antenuptial agreements as a waiver of ERISA benefits was "incorrect" and declined to follow it. 214 Ill. App.3d at 437. In the instant case the antenuptial agreement was as clear a waiver of spousal rights as there could be. Certiorari should be granted to review the propriety of regulations that appear plainly unreasonable under the legislation that they purport to interpret.

Although deference is to be accorded to the interpretation of a statute by an agency charged with its enforcement, see Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-45 (1985), the extent of that deference is limited to the "clear meaning of the statute, as revealed by its language, purpose and history." IBT v. Daniel, 439 U.S. 551, 566 n.20 (1979). The agency's regulation must constitute "a permissible construction of the statute." Chevron, 467 U.S. at 842-43. Here neither the plain language of Section 1055 nor its legislative history indicate any intent whatsoever to displace antenuptial agreements. The Commissioner's blanket decision to exclude all antenuptial agreements as appropriate vehicles for a waiver of spousal rights and his failure to provide in the regulation for general consent to beneficiary designations as set forth in the statute are not a permissible construction of the statute and, as such, cannot be deferred to by the courts. See, e.g., Commissioner v. Engle, 464 U.S.

206, 224 (1984) (declining to defer to unreasonable position of Internal Revenue Service).

CONCLUSION

For the foregoing reasons petitioner respectfully prays that the Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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for Petitioner
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APPENDIX A

Opinion of the United States
Court of Appeals for the Second Circuit
December 28, 1992
(reported at 982 F.2d 778 (2d Cir. 1992))

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 299 -- August Term, 1992

Peter Hurwitz,
Plaintiff-Appellant,

v.

Joan Lear Sher,
Defendant-Appellee.

[Appearances Omitted]

OAKES, Circuit Judge:

Plaintiff Peter Hurwitz ("Peter") appeals from a grant of summary judgment in favor of the defendant, Joan Lear Sher. Hurwitz v. Sher, 789 F. Supp. 134 (S.D.N.Y. 1992). The district court held that a spouse's antenuptial agreement does not constitute an effective waiver under the Employee Retirement Income Security Act ("ERISA") of death benefits under an employee benefit plan. Peter argues that he is his deceased father's sole beneficiary under the

Algonquin Press, Inc. Employees Profit Sharing Plan (the "Plan") and that Sher effectively waived any claims to spousal benefits through the antenuptial agreement (the "Agreement"). We affirm.

I. Background

The deceased, David Hurwitz ("David"), was an attorney and chief executive officer of Algonquin Press, Inc. At the time of his death, David was the sole participant in the Plan, a qualified profit sharing plan subject to the provisions of ERISA and the qualified plan rules of the Internal Revenue Code ("IRC"). In compliance with section 205 of ERISA, 29 U.S.C. § 1055 (1988 & Supp. II 1990), and IRC § 417(A) (1988),[1] the Plan provides that the beneficiary of death benefits shall be the participant's spouse. For a spousal waiver of these rights to be effective, the spouse must execute a signed document which acknowledges the effect of the waiver and is witnessed by a notary public or a plan representative.

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[1] This section of the IRC parallels the ERISA language in establishing the requirements for benefit plans to qualify for tax exempt status. Authority to issue regulations concerning the parallel provisions has been lodged in the Secretary of the Treasury. See Reorg. Plan No. 4 of 1978 § 101, 3 C.F.R. 332 (1978), reprinted in 1978 U.S.C.C.A.N. 9814 (transferring authority with regard to certain ERISA provisions from Secretary of Labor to Secretary of Treasury). The IRS's interpretations for the statute are embodied in Treasury Regulations.

Before his marriage to Sher, David had been married twice. In 1988, he had his second wife execute a waiver of benefits which complied with the conditions stated in the Plan and required under ERISA. Peter, David's son by his first wife, was designated as the beneficiary. David married the defendant, Sher, in 1990.

Before marrying David, Sher signed the Agreement, foregoing any rights to her future husband's property upon his death. The Agreement provided, in part, that "each party hereby waives and releases to the other party and to the other party's heirs, executors, administrators and assigns any and all rights and causes of action which may arise by reason of the marriage between the parties . . . with respect to any property, real or personal, tangible or intangible . . . now owned or hereafter acquired by the other party, as fully as though the parties had never married . . . ."

Nine months after marrying Sher, David died. Peter is David's sole heir in light of the antenuptial agreement and David's will.

On May 15, 1991, Peter commenced this action against Sher in Supreme Court, New York County, seeking a declaration that he is the sole recipient of Plan benefits. On May 23, 1991, Sher removed the action to the Southern District of New York, pursuant to 28 U.S.C. § 1441(a) (1988), as federal statutes govern the disposition of this case. On June 4, 1991, Sher filed a counterclaim seeking a declaration pursu-

ant to 28 U.S.C. § 2201 (1988) that (1) under the applicable provisions of ERISA, the Internal Revenue Code, the Treasury Regulations and the Plan, she, as the spouse of the deceased, is the rightful beneficiary of the Plan; and (2) that the provisions contained in the Agreement constitute neither a valid nor an effective waiver of her rights as a beneficiary of the Plan. Both parties moved for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. The district court granted Sher's motion. For the reasons set forth below, we affirm.

II. Discussion

Summary judgment is appropriate if, in light of the evidence presented, there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250 (1986). The moving party bears the burden of demonstrating the absence of a genuine issue of material fact, Adickes v. S.H. Kress & Co., 398 U.S. 144, 157 (1970). In making this determination, we must view the facts in the most favorable light for the nonmoving party. United States v. Diebold, Inc., 369 U.S. 654, 655 (1962). Here, the parties agree that no material facts are in dispute. The only source of dispute is the parties' disagreement over the effectiveness of the antenuptial agreement as a waiver of spousal benefits under the Plan.

As a preliminary matter, Peter argues that New York law should provide guidance as to the

outcome of this case. It does not. ERISA's preemption provision is very broad: ERISA "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title." 29 U.S.C. § 1144(a) (1988). Under this provision, pension plan regulation is made an exclusively federal concern. Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 44-46 (1987). Peter argues that ERISA is silent on the effectiveness of antenuptial agreements as spousal waivers, justifying an application of state law.[2] See

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[2] According to Peter, the district court also overlooked a provision of ERISA which would support his argument. ERISA provides a limited exception to the general prohibition on alienation of benefits for "qualified domestic relations orders" ("QDROs"). See U.S.C. § 1144(b)(7) (1988). This provision ensures that such family obligations as alimony or child support will be payable out of benefits. Plaintiff argues that this exception applies because the decree of the New York Surrogate's Court, which granted him letters of administration to administer his father's estate, is in fact a QDRO.

Section 206(d)(3) of ERISA defines a QDRO, in pertinent part, as follows:

(B) For purposes of this paragraph --

. . .

(ii) the term "domestic relations order" means any judgment, decree, or order (including approval of a property settlement agreement) which --

---

> (I) relates to the provision of child support, alimony payments, or marital property rights to a spouse, former spouse, child, or other dependent of a participant, and
>
> (II) is made pursuant to a State domestic relations law (including a community property law).

(C) A domestic relations order meets the requirements of this subparagraph only if such order clearly specifies --

> (i) the name and last known mailing address . . . of the participant and . . . each alternate payee . . .,
>
> (ii) the amount or percentage of the participant's benefits to be paid by the plan to each such alternate payee, or the manner in which such amount or percentage is to be determined.
>
> (iii) the number of payments or period to which such order applies, and
>
> (iv) each plan to which such order applies.

29 U.S.C. § 1056(d)(3) (1988 & Supp. II 1990).

The decree of the Surrogate's court in this case does not meet the statutory requirements for a QDRO

Amato v. Western Union Intl., Inc., 773 F. 2d 1402, 1419 (2d Cir. 1985), cert. dismissed, 474 U.S. 1113 (1986) (although ERISA is governed by federal law, when ERISA is silent, courts may look to state law). This argument is without merit. Although ERISA does not speak specifically to the issue of antenuptial agreements, it does set out quite plainly the requirements for an effective spousal waiver of benefits. 29 U.S.C. § 1055.

In order to determine which party is entitled to receive benefits under the Plan, we must first consider the statutory language of ERISA. Pilot Life Ins. Co., 481 U.S. at 57. ERISA was amended in 1984 by the Retirement Equity Act (the "REA") to ensure that a participant's spouse receives survivor benefits from a retirement plan even if the participant dies before reaching retirement age. Pub. L. 98-397, 98 Stat. 1426 (1984). The REA established clear criteria for a waiver of benefits by the spouse:

(2) Each plan shall provide that an election [of a waiver] . . . shall not take effect unless --

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under paragraph (C) nor does it relate to the fundamental purposes of this provision -- to protect a spouse or former spouse's rights to child support, alimony payments or marital property. The decree merely deals with the administration of the decedent's estate. Consequently, Peter's argument fails.

> (A)(i) the spouse of the participant consents in writing to such election, (ii) such election designates a beneficiary (or form of benefits) which may not be changed without spousal consent (or the consent of the spouse expressly permits designations by the participant without any requirement of further consent by the spouse), and (iii) the spouse's consent acknowledges the effect of such election and is witnessed by a plan representative or a notary public.

29 U.S.C. § 1055(c) (1988). IRC § 417 (a) (1988) states the same requirements.

The Agreement did not satisfy these unambiguous statutory specifications. As the district court noted, the antenuptial agreement did not designate a beneficiary and did not acknowledge the effect of the waiver as required by ERISA. Hurwitz, 789 F. Supp. at 137. The district court also relied on the fact that Sher had not been a spouse when she signed the agreement.[3] Id.

We do not find the district court's construction to be erroneous. The unambiguous statutory language controls except in those "rare cases [in which] the literal application of a statute will produce

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[3]We reserve judgment on whether the antenuptial agreement might have operated as an effective waiver if its only deficiency were that it had been entered into before marriage.

a result demonstrably at odds with the intentions of its drafters." Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 571 (1982). Peter argues that the district court's reading of the statute is indeed "demonstrably at odds" with the legislative intent. Specifically, he notes that Congress evinced a concern with protecting the interests of nonparticipant spouses who had no retirement benefits of their own but who had contributed in a nonfinancial way to the family unit. Further, Peter argues that the legislative history betrays no intent to disinherit the children of previous marriages. Thus, he asserts, the REA must be construed to allow waivers through antenuptial agreements.

This argument, however, must fail. The Congressional sponsors of this provision did indeed intend to protect long-term homemakers' rights to their spouses' retirement benefits. See S. Rep. No. 98-575, 98th Cong., 2d Sess. 1 (1984), reprinted in 1984 U.S.C.C.A.N. 2547, 2547 (REA designed to provide for greater equity in pension plans for workers and spouses "by taking into account changes in work patterns, the status of marriage as an economic partnership, and the substantial contribution to that partnership of spouses who work both in and outside the home . . . .") Furthermore, it is likely that the Congressional sponsors did not anticipate the situation at issue here, in which two older, wealthy individuals relied on an antenuptial agreement to protect their children's inheritances. However, we cannot say that just because Congress intended to protect spouses who have been long-term

partners, it meant to permit the casual disenfranchisement of newly-weds. As no legislative intent can be discerned to exclude such spouses from the clear provisions of the statute, we will not exempt them by fiat.

Moreover, the alternative interpretation suggested by Peter would entail great practical difficulties which cast doubt on his claim that it is what Congress intended. His argument if accepted would require the courts to examine the individual circumstances behind each assertion of spousal waiver to assess whether the parties fit the Congressional model. Perhaps, in this case, the outcome is inequitable if it defeats David's alleged intent to preserve all his assets for his son and does not serve the Congressional purpose of protecting a long-term spouse from being divested of benefits. In other cases, however, an antenuptial agreement might be signed at the beginning of a long marriage partnership. In these cases, making such an agreement effective as a waiver under ERISA would cause the same problems that the Congressional sponsors were trying to alleviate. As one court has said in a similar case,

> It may seem inequitable that Mr. Jensen should be deemed the beneficiary if Mrs. Jensen's actual intent was that the benefits go to her daughter. The Retirement Equity Act says what it says, however, and so does the plan document. We must follow their provisions. It is neither unlawful nor unreasonable for

> the terms of a benefit plan to specify that the intent of a plan participant with respect to the designation of a beneficiary must be manifested in a writing that meets the requirements of the statute and that has been filed with the plan trustee. Such a requirement represents a simple and effective safeguard against fraud, and it reduces the likelihood that the plan trustee or administrators will have to make costly -- and perhaps inconclusive -- inquiries into the subject state of mind of deceased plan participants.

Howard v. Branham & Baker Coal Co., 968 F.2d 1214 (table), No. 91-5913, reported in full at 1992 U.S. App. LEXIS 16247, at *10-11 (6th Cir. July 6, 1992) (unpublished).

Treasury Regulations § 1.401(a)-20 (1991) further support the district court's decision. "Because the IRS is one of the agencies charged with administering ERISA, its interpretations of the statute are entitled to great deference." Rose v. Long Island R.R. Pension Plan, 828 F.2d 910, 918 (2d Cir. 1987), cert. denied, 485 U.S. 936 (1988). Thus, the regulations "`must be sustained unless unreasonable and plainly inconsistent with the revenue statutes,' and 'should not be overruled except for weighty reasons.'" Bingler v. Johnson, 394 U.S. 741, 750 (1969) (quoting Comm'r v. South Texas Lumber Co.,, 333 U.S. 496, 501 (1948).

The Treasury Regulations specifically address antenuptial agreements:

> Q-28 Does consent contained in an antenuptial agreement or similar contract entered into prior to marriage satisfy the consent requirements of sections 401(a)(11) and 417 (of The Internal Revenue Code)?
>
> A-28 No. An agreement entered into prior to marriage does not satisfy the applicable consent requirements, even if the agreement is executed within the applicable election period.
>
> . . . .
>
> Q-32 What rules govern a participant's waiver of the spousal benefit of section 401(a)(11)(B) (of The Internal Revenue Code)?
>
> A-32 (a) Application. In the case of a defined contribution plan . . . a participant may waive the spousal benefit of section 401(a)(11)(B)(iii) if the conditions of paragraph (b) are satisfied . . . .
>
> (b) Conditions. . . . (T)he participant's waiver of the spousalbenefit must state the specific nonspouse beneficiary who will receive

> such benefit. The waiver is not required to specify the optional form of benefit. The participant may change the optional form of benefit, but not the nonspouse beneficiary, without obtaining the spouse's consent.

Treas. Reg. § 1.401(a)-20 (1991).[4]

We are not alone in finding that antenuptial agreements lacking ERISA waiver requirements do not constitute effective waivers under ERISA. See Howard v. Branham & Baker Coal Co., 1992 U.S. App. LEXIS 16247 at *6-7 (antenuptial agreement does not constitute valid consent under ERISA); Zinn v. Donaldson Co., Inc., 799 F. Supp. 69, 73 (D. Minn. 2992) (same); Nellis v. Boeing Co., 15 Employee Benefits Cas. (BNA) 1651, 1992 U.S. Dist. LEXIS 8510 at *12-13 (D. Kan. 1992), (same).

Peter has found only one case which has reached the opposite conclusion. In In re Estate of Hopkins, 214 Ill. App. 3d 427, 574 N.E.2d 230, appeal denied, 141 Ill. 2d 542, 580 N.E.2d 115 (1991), a state appeals court held that an antenuptial agreement operates as an effective waiver of spousal benefits

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[4] Some of the Treasury Regulations are written in question and answer form. The novel format does not alter their weight as regulations. See, e.g., Branch v. G. Bernd Co., 955 F.2d 1574, 1581 & n.6 (11th Cir. 1992); Communications Workers of America v. NYNEX Corp., 898 F.2d 887, 889 (2d Cir. 1990).

under ERISA. The district court in this case properly distinguished Hopkins, noting that the Illinois court had erroneously relied on Fox Valley & Vicinity Constr. Workers Pension Fund v. Brown, 897 F. 2d 275 (7th Cir.), cert. denied, ___ U.S. ___, 111 S.Ct. 67 (1990). The Hopkins court read Fox Valley to hold that "a surviving spouse can waive her interests in a plan under the REA without following (the) specific waiver requirements [of ERISA as amended in 1984]." Hopkins, 574 N.E. 2d at 235. Fox Valley, however, addressed the question of whether a divorced spouse who was designated as a beneficiary prior to divorce may still receive death benefits despite a waiver provision in a divorce settlement. Fox Valley, 897 F.2d at 278. A divorced spouse, unlike a current spouse, is not protected by the explicit terms of the statute. The Seventh Circuit held therefore that a divorced spouse may waive benefits without following the explicit requirements of the statue. The Hopkins court erred by applying the same logic to current spouses. In reaching its decision, the Illinois court failed to consider the explicit requirements of ERISA with respect to spousal waivers. Moreover, the court in Hopkins disregarded the Treasury Regulations as merely "interpretive" and not binding. As noted above, these Regulations must be accorded some deference and may not be dismissed outright. See Bingler v. Johnson, 394 U.S. 741, 749-50 (1969).

Peter makes one further argument, this time in equity. In light of David's alleged intent to divest Sher of pension benefits, he argues that Sher should be forced to conform to the terms of the antenuptial

agreement. This contention, however, is merely an attempt to evade the clear statutory requirements. Cf. Zinn, 799 F. Supp. at 74 (rejecting same argument). See also Callahan v. Hutsell, Callahan & Buchino, P.S.C. Revised Profit Sharing Plan, No. C91-0616-L(J), slip op. at 9 (W.D. Ky. Feb 18, 1992) (refusing to order beneficiary to sign a waiver after her spouse's death despite the fact that she had previously agreed in an antenuptial agreement to sign such a waiver). We feel it would be inappropriate to plumb the decedent's ambiguous intentions when the statutory requirements are so clear.

III. Conclusion

The Agreement in this case did not conform to the specific requirements set forth in section 205 of ERISA, 29 U.S.C. § 1055. For this reason, we affirm the decision of the district court.

APPENDIX B

Opinion of the United States District
Court for the Southern District of New York
April 8, 1992
(reported at 789 F.Supp. 134 (S.D.N.Y. 1992))

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

PETER HURWITZ,

Plaintiff,

91 Civ. 3486(RPP)

-against-

OPINION AND ORDER

JOAN LEAR SHER,

Defendant.
----------x

APPEARANCES

[omitted]

ROBERT P. PATTERSON, JR., U.S.D.J.

On May 15, 1991 Plaintiff Peter Hurwitz ("Plaintiff") commenced this action against Defendant

Joan Lear Sher ("Defendant") in Supreme Court, New York County seeking a declaration that he is the sole beneficiary of his father (the "Deceased")'s interest in the Algonquin Press, Inc. Employees Profit Sharing Plan (the "Plan"). On May 23, 1991 Defendant removed the action to this Court pursuant to 28 U.S.C. § 1331.[1] On June 4, 1991 Defendant filed a counterclaim seeking a declaration pursuant to 28 U.S.C. § 2201 that: (1) under the applicable provisions of the Employee Retirement Income Security Act ("ERISA"), the Internal Revenue Code, the Treasury Regulations and § 6.2(d) of the Plan, she, as the spouse of the Deceased, is the rightful beneficiary of the Plan; and (2) that the provisions contained in an antenuptial agreement (the "Agreement") constitute neither a valid nor an effective waiver of her rights as beneficiary of the Plan. The parties each have moved for an order granting summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. For the reasons set forth below, Defendant's motion is granted, and Plaintiff's motion is denied.

BACKGROUND

The Deceased, an attorney and chief executive officer of Algonquin Press, Inc., was the sole participant in the Plan, an ERISA employee benefit plan qualified under § 401(a) of the Internal Revenue Code. The applicable provisions of the Plan provide that with respect to death benefits, the beneficiary

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[1] The issues involved are governed by federal statutes.

shall be the participant's spouse, and in waiving any of these rights the spouse must acknowledge the effect of such waiver. These provisions of the Plan, §§ 6.2 (d) and (e), were added on November 17, 1986 to comply with 29 U.S.C. § 1055 of ERISA and 26 U.S.C. § 401 of the Internal Revenue Code. As amended, the Plan provisions provide the following:

> (d) The Beneficiary of the death benefit payable pursuant to this Section shall be the Participant's spouse. Except, however, the Participant may designate a Beneficiary other than his spouse if:
>
> (i) the spouse has waived his or her right to be the Participant's Beneficiary, or
>
> (ii) the Participant has no spouse, or the spouse cannot be located.
>
> • • •
>
> (e) Any consent by the Participant's spouse to waive any rights to the death benefit must be in writing, must acknow-ledge the effect of such waiver, and be witnessed by a Plan representative or a notary public.

Sher Aff. in Supp., Exh. 5 at 3-4.

In 1988 the Deceased divorced his second wife.[2] On July 21, 1988, in connection with the divorce settlement but apparently prior to the divorce, the Deceased's second wife executed a spousal consent to the designation of Plaintiff as the beneficiary of the Deceased's interest in the Plan, thereby waiving her right to a death benefit provided under the Plan. The designation provided, "I consent to the selection of primary beneficiary indicated by my spouse in this form. I understand that I am waiving my right to a death benefit provided under the Plan(s) in accordance with Federal Law by signing this consent." Sher Aff. in Supp., Exh. 3. This waiver complied with the applicable provisions of the Plan and ERISA. The written designation of Plaintiff as the beneficiary also contained the following provision signed by the Deceased:

> I understand that if my marital status changes, I am to provide information relating to that change to the Plan Administrator as any change in my marital status could affect the benefits to be paid as a result of my death.
>
> I understand that if I am married at the time of my death, my surviving spouse will receive the surviving spouse's death benefit from the Plan(s) as required by

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[2] The Deceased's first wife, from whom he was divorced in 1966, is the mother of his only child, the Plaintiff in this action.

> law UNLESS she/he has completed and signed the Spousal Consent below and had such Consent witnessed by a Notary Public or the Plan Administrator.

Id. emphasis in original).

Defendant and the Deceased were married on January 7, 1990. Prior to their marriage, they executed an antenuptial agreement on December 27, 1989, which provided, in part, that "each party hereby waives and releases to the other party . . . any and all rights and causes of action which may arise by reason of the marriage between the parties . . . with respect to any property, real or personal, tangible or intangible now owned or hereafter acquired by the other party as fully as though the parties had never married." Sher Aff. in Supp., Exh. 4, ¶ 3. Algonquin Press, Inc. never received a new beneficiary designation from the Deceased, nor any information relating to his change in marital status. Moreover, Defendant, as the Deceased's new spouse, never signed a designation form consenting to the designation of a non-spouse beneficiary (i.e. the Plaintiff).

On October 5, 1990 the deceased died, leaving Defendant as his surviving spouse and, in view of the antenuptial agreement, Plaintiff as his sole heir. Plaintiff was appointed administrator of the estate, there being no last will and testament admitted to probate. Defendant consented to the appointment, reserving her rights with respect to her claim to the

Deceased's interest in the Plan. Sher Aff. in Supp. ¶ 15.

DISCUSSION

Summary judgment is appropriate if the evidence offered demonstrates that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986). The burden rests on the moving party to demonstrate the absence of a genuine issue of material fact, Adickes v. S. H. Kress & Co., 398 U.S. 144, 157 (1970), and the Court must view the facts in the light most favorable to the non-moving party. United States v. Diebold, Inc., 369 U.S. 654, 655 (1962). Here, the parties agree that there is no material issue of fact;[3] however, each party claims that as a matter of law, it is the proper beneficiary of the Plan. At issue is whether the antenuptial agreement signed by Defendant constituted an effective waiver of her rights to receive the Deceased's benefits under the Plan.

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[3] Defendant claims that both Plaintiff and the Deceased told her that she would be the beneficiary of the Plan, in spite of the antenuptial agreement. Sher Aff. in Supp. ¶ 14. The assertion, which Plaintiff disputes, is not material to the Court's determination of the instant motions, nor is it considered relevant thereto.

Defendant claims that under the governing ERISA and Internal Revenue Code provisions the execution of the Agreement eleven days prior to her marriage to the Deceased does not constitute an effective waiver of the benefits to which she would otherwise be entitled under the Plan for three reasons: (1) it was not signed by a spouse; (2) it was in a writing which did not designate a beneficiary; and (3) it did not acknowledge the effect of such consent. These three elements are required under §§ 6.2 (d) and (e) of the Plan as well as under 29 U.S.C § 1055(c) of ERISA and 26 U.S.C. § 417(a) of the Internal Revenue Code.

The ERISA preemption provision is an expansive one: ERISA "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title." 29 U.S.C. § 1144. This language is designed to establish pension plan regulation as an exclusively federal concern. Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 45 (1987). Thus, in considering a designation of the proper beneficiary to an ERISA plan, this Court first should look to the statute itself or any existing federal common law in resolving the instant case.[4]

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[4] It appears that this question, whether an antenuptial agreement constitutes a valid waiver of a current spouse's rights as a beneficiary under an ERISA-qualified pension plan, is an issue of first impression in the federal courts. Cf. Fox Valley & Vicinity Construction Workers Pension Fund v.

The applicable ERISA provision, 29 U.S.C. § 1055(c), describes the nature of the consent required to waive spousal rights to employee plan benefits:

> (2) Each plan shall provide that an election [of a waiver] under paragraph (1)(A)(i) shall not take effect unless--
>
> > (A)(i) the spouse of the participant consents in writing to such election, (ii) such election designates a beneficiary (or form of benefits) which may not be changed without spousal consent (or the consent of the spouse expressly permits designations by the participant without any requirement of further consent by the spouse), and (iii) the spouse's consent acknowledges the effect of such election and is witnessed by a plan representative or a notary public.

Similarly, 26 U.S.C. § 417(a) of the Internal Revenue Code provides parallel requirements:

> (2) **Spouse must consent to Election.** Each plan shall provide that an election (of a waiver) under paragraph (1)(A)(i) shall not take effect unless--

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Brown, 897 F.2d 275 (7th Cir.), cert. denied, 111 S. Ct. 67 (1990) (discussing rights of divorced spouse under deceased husband's ERISA-qualified pension plan).

> (A)(i) the spouse of the participant consents to such election (ii) such election designates a beneficiary (or a form of benefits) which may not be changed without spousal consent (or the consent of the spouse expressly permits designations by the participant without any requirement of further consent by the spouse, and (iii) the spouse's consent acknowledges the effect of such election and is witnessed by a plan representative or a notary public, or
>
> (B) It is established to the satisfaction of a plan representative that the consent required under subparagraph (A) may not be obtained because there is no spouse, because the spouse cannot be located, or because of such other circumstances as the Secretary may by regulations prescribe.

Interpretation of a statute must begin with the statute's language. Mallard v. United States Dist. Court for the S. Dist. of Iowa, 109 S. Ct. 1814, 1818 (1989). Here, both 29 U.S.C. § 1055(c) and 26 U.S.C. § 417(a) require consent to the waiver to be provided by the participant's spouse. When Defendant signed the Agreement, she was the Deceased's fiancee, not his spouse. Therefore, Defendant, as a fiancee, could not effectively waive her rights within the meaning of 29 U.S.C. § 1055(c) and 26 U.S.C. § 417(a).

These provisions of ERISA and the Internal Revenue Code also require that the waiver designate a specific beneficiary of the Plan. Here, the

Agreement fails again by not specifying a non-spouse beneficiary who will receive the benefits. Similarly, the Agreement is not an effective waiver because it does not acknowledge the effect of the waiver, as required by 29 U.S.C. §1055(c) and 26 U.S.C. § 417(a).

Treasury Regulation § 1.401(a)-20 provides additional support for Defendant's position. Question and Answer #28 and #32 apply specifically to the instant action:

> Q-28 Does consent contained in an antenuptial agreement or similar contract entered into prior to marriage satisfy the consent requirements of sections 401(a)(11) and 417 [of The Internal Revenue Code]?
>
> A-28 No. An agreement entered into prior to marriage does not satisfy the applicable consent requirements, even if the agreement is executed within the applicable election period.
>
> Q-32 What rules govern a participant's waiver of the spousal benefit under section 401(a)(11)(B) [of The Internal Revenue Code]?
>
> A-32 (a) **Application.** In the case of a defined contribution plan . . . a participant may waive the spousal benefit of section 401(a)(11)(B)(iii) if the conditions of paragraph (b) are satisfied . . . .
>
> (b) **Conditions** . . . Thus, the participant's waiver of the spousal benefit must state the

> specific nonspouse beneficiary who will receive such benefit. The wavier is not required to specify the optional form of benefit. The participant may change the optional form of benefit, but not nonspouse beneficiary, without obtaining the spouse's consent.

Treas. Reg. §1.401(a)-20 (1991)

The Treasury Regulations attempt to interpret Congressional intent behind statutory language. They "must be sustained unless unreasonable and plainly inconsistent with the revenue statutes, and should not be overruled except for weighty reasons." Bingler v. Johnson, 394 U.S. 741, 749-750 (1969) (emphasis added). Here, the Treasury Regulations are neither unreasonable nor inconsistent with the statutory language. Moreover, Plaintiff has advanced no weighty reasons mandating their reversal.[5] Accordingly, they should not be overruled.

Notwithstanding the above statutes and regulations, Plaintiff argues that state law governs the resolution of this case. In support of his position,

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[5] Plaintiff argues that upholding the Regulation would result in Defendant receiving benefits which she had no expectation of receiving. As mentioned supra, whether Defendant was told she was the beneficiary of the Plan is disputed. Under ERISA defendant's expectations as to her rights under the Plan, however, are irrelevant. Instead, it is her knowing waiver that is relevant.

he relies on In re Estate of Hopkins, 574 N.E.2d 230, appeal denied, 580 N.E.2d 115 (Ill. App. Ct. 1991). However, as the court in Hopkins conceded, federal law governs this issue.[6] A state court interpretation of the applicable federal law is not binding on this Court. Furthermore, in Hopkins, the Illinois state court erroneously relied on Fox Valley & Vicinity Construction Workers Pension Fund v. Brown, 897 F.2d 275 (7th Cir.), cert. denied, 111 S. Ct. 67 (1990). The court read Fox to hold that, "a surviving spouse can waive her interests in a plan without following [the] specific waiver requirements [of ERISA as amended in 1984]." Hopkins, 574 N.E.2d at 235 (emphasis added). However, the issue in Fox Valley was whether a divorced spouse who was designated as a beneficiary prior to the divorce would still receive a death benefit despite a provision in a divorce settlement waiving any rights to the benefit. The Seventh Circuit noted that both ERISA and the existing body of federal common law interpreting ERISA are silent on the issue of what constitutes a proper waiver in a divorce agreement. Fox Valley, 897 F.2d at 280. Therefore, it was free to turn to state law to conclude that the settlement did in fact constitute a valid waiver of the benefits under the ERISA plan.

The instant case involves a current spouse who has statutorily protected rights. Moreover, 29 U.S.C.

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[6] Despite this acknowledgement, the Illinois court found that the antenuptial agreement in that case did constitute a valid waiver. Hopkins, 574 N.E.2d at 235.

§ 1055(c) and 26 U.S.C. § 417(a) are not silent as to the proper form of consent necessary for a spouse to waive plan benefits. Instead, they outline specific requirements which must be fulfilled for a spouse to effectuate a valid waiver. As described above, these requirements were not met by the antenuptial agreement between the Deceased and Defendant. Accordingly, the Agreement does not constitute an effective waiver of Defendant's rights to the Plan's benefits, and Defendant is the proper beneficiary of the Plan.

CONCLUSION

For the foregoing reasons, Plaintiff's motion is denied, and Defendant's motion is granted. This case is ordered closed.

IT IS SO ORDERED.

Dated: New York, New York
April 8, 1992

Robert P. Patterson, Jr.
U.S.D.J.

Supreme Court, U.S.
F I L E D
APR 22 1993
OFFICE OF THE CLERK

No. 92-1572

In The

Supreme Court of the United States

October Term, 1992

PETER HURWITZ,

Petitioner,

vs.

JOAN LEAR SHER,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

(1) Is respondent, as the surviving spouse of a participant in a qualified profit sharing plan covered by the Employee Retirement Security Act of 1974, as amended ("ERISA"), entitled to her deceased husband's interest in the plan because the plan, the relevant ERISA and Internal Revenue Code statutory sections, specific Treasury Regulations and uniform federal court decisions all provide or hold that the surviving spouse is entitled to the deceased's entire account balance under the plan?

(2) Does an antenuptial agreement signed by the deceased and respondent eleven days prior to their marriage, which agreement did not specify the beneficiary to be designated or the effect of the waiver and did not otherwise comply with the plan language or statutory provisions governing spousal consent to waive ERISA plan benefits, constitute a valid and effective consent by respondent as the surviving spouse of the deceased under ERISA, the Internal Revenue Code, specific Treasury Regulations and the plan?

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Supreme Court Rule 15.1 1

STATEMENT OF THE CASE

Pursuant to Supreme Court Rule 15.1, the respondent provides her own statement of relevant facts in order to correct various misstatements and omissions in the Petition.[1]

The Court of Appeals for the Second Circuit, affirming the district court decision, held in this case that respondent, as the surviving spouse, is entitled to the entire interest of her deceased husband, David Hurwitz (the "deceased"), in the Algonquin Press, Inc. Employee Profit Sharing Plan (the "Plan") -- under the provisions of the Plan itself, ERISA, the Internal Revenue Code of 1986, as amended ("Internal Revenue Code" or "IRC"), and pertinent Treasury Regulations. In so holding, the Second Circuit ruled that the provisions of an antenuptial agreement executed by the deceased and respondent eleven days prior to their marriage did not constitute a valid or effective consent by respondent to waive her entitlement to surviving spousal benefits under the Plan because it did not satisfy the statutory requirements for such a consent.

David Hurwitz, the deceased, was an attorney and chief executive officer of Algonquin Press, Inc. (C.A. App. at 70). On October 5, 1990, the date of his death, the deceased was

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[1] "Pet." refers to the Petition for a Writ of Certiorari and the Appendix thereto. "C.A. App." refers to the Appendix jointly filed in the Court of Appeals.

the sole participant in the Plan, a qualified profit sharing plan subject to the provisions of ERISA and the qualified plan rules of IRC §§ 401(a) and 401(a)(11)(B)(iii) (C.A. App. at 69-70, 83). The Plan provided, in § 6.2 (d) and (e), amendments added on November 17, 1986 to comply with 29 U.S.C. § 1055 (ERISA § 205) and 26 U.S.C. § 401 (IRC), that a participant's beneficiary entitled to receive the participant's nonforfeitable accrued benefits upon death shall be the participant's spouse, and that an effective spousal consent to waive those rights is valid only if it is in writing signed by the spouse, acknowledges the effect of such waiver, and is witnessed by a Plan representative or notary public (C.A. App. at 82-83). All of the Plan documents were executed by the deceased as the trustee of the Plan (C.A. App. at 55, 61).

Prior to his marriage to respondent, the deceased had been married twice. His first wife, from whom he was divorced in 1966, is the mother of his only child, the petitioner herein (C.A. App. at 69, 71). In 1988, the deceased divorced his second wife after 20 years of marriage (C.A. App. at 71). On July 21, 1988, in connection with their divorce settlement agreement, the deceased's second wife executed a consent to waive benefits which complied with the conditions set forth in the Plan and as required under ERISA. In that same document, petitioner was designated as the beneficiary, and the

second wife expressly consented to that beneficiary designation (C.A. App. at 30-31, 71-72).

The 1988 waiver by the second wife and consent to the designation of petitioner as beneficiary complied with the provisions of the Plan, ERISA and the IRC; in the document the second wife acknowledged, "I consent to the selection of primary beneficiary indicated by my spouse in this form. I understand that I am waiving my right to a death benefit provided under the Plan(s) in accordance with Federal Law by signing this consent." (C.A. App. at 30-31, 71-72). The written designation of petitioner was signed, and contained the following acknowledgment, by the deceased:

> I understand that if I am married at the time of my death, my surviving spouse will receive the surviving spouse's death benefit from the Plan(s) as required by law UNLESS she/he has completed and signed the Spousal Consent below and had such Consent witnessed by a Notary Public or the Plan Administrator. (C.A. App. at 31).

Eleven days prior to their marriage, the deceased and respondent executed an antenuptial agreement which provided, in part, that "each party hereby waives and releases to the other party and to the other party's heirs, executors, administrators and assigns any and all rights and causes of action which may arise by reason of the marriage between the parties ... with respect to any property, real or personal, tangible or intangible ... now owned or hereafter acquired by the other

party, as fully as though the parties had never married..." (C.A. App. at 18).

The antenuptial agreement also provided:

> FOURTH: Nothing in this agreement shall affect...(ii) the rights of either party arising from any voluntary transfer to such party by the other party... (C.A. App. at 20).

During their marriage, the deceased neither executed a new beneficiary designation form nor asked respondent to sign a statutorily valid spousal consent, or any spousal consent at all, to an alternate beneficiary designation (C.A. App. at 72-73, 78). Indeed, during their marriage, the deceased told respondent that he intended, and the law provided, that respondent would receive all of his interest under the Plan (C.A. App. at 72). This fact, set forth by respondent in her moving papers in the district court, has never been denied by petitioner in any affidavit.[2]

The deceased and respondent were married on January 7, 1990 and lived together in her home in Larchmont, New York until October 5, 1990 when the deceased died suddenly, leaving respondent as his surviving spouse. As the result of

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[2] Respondent concurs in the district court finding that the deceased's promise and representation and respondent's expectation that she would receive these benefits are irrelevant to the determination of the case (Pet. at 21a). These facts were set forth below, and here, solely to rebut petitioner's repeated references in all courts to the alleged "unfairness" of the determinations below (See, e.g., Pet. at 8, 10a, 15a).

the antenuptial agreement, petitioner was the sole heir of property passing through the deceased's estate (C.A. App. at 69). Petitioner was appointed administrator of the estate, there being no last will and testament admitted to probate (C.A. App. at 73). Respondent consented to the appointment, reserving her rights with respect to her claim to the deceased's interest in the Plan (C.A. App. at 73).

On May 15, 1991, petitioner commenced this action against respondent in Supreme Court, New York County, seeking a declaration that he is entitled to be the sole recipient of Plan benefits. On May 23, 1991, respondent removed the action to the United States District Court for the Southern District of New York, pursuant to 28 U.S.C. § 1441(a) (1988), on the ground that federal statutes (ERISA and the IRC) govern the disposition of the case. On June 4, 1991, respondent filed a counterclaim seeking a declaration pursuant to 28 U.S.C. § 2201 (1988) that she is the rightful beneficiary of the deceased's interest under the Plan and that the antenuptial agreement constituted neither a valid nor an effective consent to waive her rights under ERISA. Both parties moved for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. The district court granted respondent's motion, and the Court of Appeals unanimously affirmed.

REASONS FOR DENYING THE WRIT

I

THE PLAIN AND UNAMBIGUOUS STATUTORY LANGUAGE OF ERISA, THE INTERNAL REVENUE CODE, THE PERTINENT TREASURY REGULATIONS, AND THE PLAN LANGUAGE ITSELF ALL COMPEL THE CONCLUSION THAT THE ANTENUPTIAL AGREEMENT IN THIS CASE DID NOT CONSTITUTE AN EFFECTIVE CONSENT BY RESPONDENT TO WAIVE HER RIGHTS AS THE SURVIVING SPOUSE BENEFICIARY UNDER THE PLAN

At the threshold, it is clear that the affirmance of the grant of summary judgment was proper, both parties having moved for summary judgment and having agreed that there are no genuine issues as to any material facts. Moreover, there is no question that qualified employee benefit plan regulation is a matter of exclusive federal concern and that ERISA's preemption (ERISA "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title" 29 U.S.C. § 1144(a) (1988)), is sufficiently broad to require that federal law must control the determination of this case.[3]

---

[3] Although he does not appear to argue directly, as he did in the Second Circuit, that state law, and not federal law, should control or at least provide guidance (cf. Pet. at 4a-5a), petitioner argues that ERISA does not specifically address antenuptial agreements and that ERISA should

Looking first, as we must (Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 57 (1987)), to the statutory language of ERISA, the Retirement Equity Act of 1984 ("REA") amendment to ERISA in 1984 was enacted for the purpose of ensuring that a surviving spouse receives survivor benefits from a retirement plan even if the participant dies before reaching retirement age. Pub. L. 98-397, 98 Stat. 1426 (1984). The REA, as further amended, establishes clear criteria for a waiver of benefits by the surviving spouse:

> (2) Each plan shall provide that an election [by a participant to waive the spousal benefit right] ... shall not take effect unless --
>
> (A)(i) the spouse of the participant consents in writing to such election, (ii) such election designates a beneficiary (or a form of benefits) which may not be changed without spousal consent (or the consent of the spouse expressly permits designations by the participant without any requirement of further consent by the spouse), and (iii) the spouse's consent acknowledges the effect of such election and is witnessed by a plan representative or a notary public . . .

29 U.S.C. § 1055(c) (1988).

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not be interpreted so as to "sweep aside the domestic relations laws of fifty states." (Pet. at 15). But, as the Second Circuit held, ERISA "does set out quite plainly the requirements for an effective spousal waiver of benefits," requirements that have not been met in this case (Pet. at 7a). The Second Circuit did not hold that these requirements could not have been satisfied in an antenuptial agreement; rather it held, as indeed it had to, that this antenuptial agreement did not conform to the statutory requirements. Plainly, the Circuit decision did not "sweep aside" all antenuptial agreements, let alone the "domestic relations laws of fifty states".

Similarly, Internal Revenue Code § 417(a) (1988) provides, in nearly identical language:

> (2) **Spouse must consent to Election.** Each plan shall provide that an election [by a participant to waive the spousal benefit right] shall not take effect unless -- (A)(i) the spouse of the participant consents in writing to such election, (ii) such election designates a beneficiary (or a form of benefits) which may not be changed without spousal consent (or the consent of the spouse expressly permits designations by the participant without any requirement of further consent by the spouse), and (iii) the spouse's consent acknowledges the effect of such election and is witnessed by a plan representative or a notary public...

In short, under the statutes, for a surviving spouse to effectively waive and be divested of rights with respect to a qualified plan, the spousal consent must:

A. designate the beneficiary;

B. acknowledge the effect of such election by the spouse; and

C. be entered into by a spouse, i.e., after marriage.

The antenuptial agreement in this case was deficient in all three of the criteria set forth above; each of the three deficiencies standing alone would disqualify the antenuptial agreement as constituting valid spousal consent.

First, the antenuptial agreement did not contain a consent to a specific beneficiary.

Next, the antenuptial agreement did not acknowledge the effect of the election by respondent to waive benefits.

Finally, the antenuptial agreement was executed eleven days prior to the marriage between respondent and the deceased. Accordingly, it was not a consent executed by a spouse. Rather, it was signed by a "fiancee."[4]

While the statutory language is quite explicit as to the requirement of a valid spousal consent, applicable Treasury Regulations,[5] in question and answer form, further explicate the requirements and specifically speak to the issue of spousal consent in an antenuptial agreement:

---

[4] Although the Second Circuit reserved judgment as to whether the antenuptial agreement might have operated as an effective waiver if its only deficiency were that it had been entered into before marriage (Pet. at 8a, fn. 3), the other federal cases considering this issue uniformly have held, as did the district court in this case and as do the Treasury Regulations, that the waiver must be executed after marriage i.e., by a spouse, not a fiancee, to be valid. See Pet. at 24a; see also, e.g., Howard v. Branham & Baker Coal Co., 968 F.2d 1214 (table), No. 91-5913, 1992 U.S. App. LEXIS 16247 (6th Cir. July 6, 1992); Nellis v. Boeing Co., 15 Employee Benefits Cas. (BNA) 1651, 1992 U.S. Dist. LEXIS 8510 (D. Kan. May 8, 1992); Zinn v. Donaldson Co., 799 F. Supp. 69, 73 (D. Minn. 1992); Callahan v. Hutsell, Callahan & Buchino, 813 F. Supp. 541 (W.D. Ky. 1992); Treas. Reg. 1.401(a)-20 Q&A 28.

[5] By application of Reorganization Plan No. 4 of 1978 (43 Fed. Reg. 47713), Treasury Regulation § 1.401(a)-20 has the force of interpreting both the spousal consent requirement of the Internal Revenue Code and the spousal consent requirement of Title I of ERISA. Under § 101 of the Reorganization Plan, the Secretary of the Treasury has jurisdiction over the subject matter addressed in these regulations. Therefore, under § 104 of the Reorganization Plan, these regulations apply when the Secretary of Labor exercises authority under Title I of ERISA.

> Q-28 Does consent contained in an antenuptial agreement or similar contract entered into prior to marriage satisfy the consent requirements of sections 401(a)(11) and 417 [of The Internal Revenue Code]?
>
> A-28 No. An agreement entered into prior to marriage does not satisfy the applicable consent requirements, even if the agreement is executed within the applicable election period.
>
> . . . .
>
> Q-32 What rules govern a participant's waiver of the spousal benefit under section 401(a)(11)(B) [of The Internal Revenue Code]?
>
> A-32(a) **Application.** In the case of a defined contribution plan...a participant may waive the spousal benefit of section 401(a)(11) (B)(iii) if the conditions of paragraph (b) are satisfied...
>
> (b) **Conditions**...Thus, the participant's waiver of the spousal benefit must state the specific nonspouse beneficiary who will receive such benefit. The waiver is not required to specify the optional form of benefit. The participant may change the optional form of benefit, but not the nonspouse beneficiary, without obtaining the spouse's consent.

Treas. Reg. § 1.401(a)-20.

Moreover, the Plan, §§ 6.2(d) and (e), as amended on November 17, 1986 to comply with 29 U.S.C. § 1055 of

ERISA, 26 U.S.C. § 401 of the IRC, and the REA amendments, provides:

> (d) The Beneficiary of the death benefit payable pursuant to this Section shall be the Participant's spouse. Except, however, the Participant may designate a Beneficiary other than his spouse if:
>
> (i) the spouse has waived his or her right to be the Participant's Beneficiary, or
>
> (ii) the Participant has no spouse, or
>
> (iii) the spouse cannot be located.
>
> * * *
>
> (e) Any consent by the Participant's spouse to waive any rights to the death benefit must be in writing, must acknowledge the effect of such waiver, and be witnessed by a Plan representative or a notary public. (C.A. App. at 82-83).

Thus, the statutes (ERISA § 205(c) and IRC § 417(a)), the Treasury Regulations (§ 1.401(a)-20), and the Plan language itself all demonstrate that the appropriate spousal consent to waive does not exist in this case, that respondent has not consented to another beneficiary, and that respondent is entitled to all of her deceased husband's interest in the Plan.

II

THERE IS NO CONFLICT AMONG THE CIRCUITS. TO THE CONTRARY, ALL OF THE FEDERAL CIRCUIT AND DISTRICT COURTS THAT HAVE CONSIDERED THE EFFECT OF ANTENUPTIAL AGREEMENTS HAVE HELD THAT THEY DO NOT CONSTITUTE EFFECTIVE WAIVERS OF SURVIVING SPOUSES' RIGHTS TO DEATH BENEFITS UNDER ERISA

Every federal case considering the issue has determined that antenuptial agreements which do not comply with the carefully-drawn waiver requirements spelled out in ERISA § 205(c), IRC § 417(a) and Treasury Regulations § 1.401(a)-20, do not constitute effective surviving spousal consents to waive plan benefits. See Howard v. Branham & Baker Coal Co., 968 F.2d 1214 (table), No. 91-5913, 1992 U.S. App. LEXIS 16247 (6th Cir. 1992) at 6-7, unpublished opinion (provisions of antenuptial agreement did not satisfy spousal consent requirements to waive spousal benefits under ERISA); Zinn v. Donaldson Co., Inc., 799 F. Supp. 69, 73 (D. Minn. 1992); Nellis v. Boeing Co., 15 Employee Benefits Cas. (BNA) 1651, 1992 U.S. Dist. LEXIS 8510 at 12-13 (D. Kan. 1992) (same); Callahan v. Hutsell, Callahan & Buchino, 813 F. Supp. 541 (W.D. Ky. 1992) (same).

Contrary to petitioner's assertion (Pet. at 8-10) that there are "conflicts in principle" between (sic) decisions of the Second, Sixth and Seventh Circuits, the federal courts have

been uniform in holding that a current, surviving spouse cannot consent to waive his or her entitlement to post-death benefits under ERISA except by a consent in writing that satisfies all of the carefully-drawn statutory requirements. Petitioner's citation of McMillan v. Parrott, 913 F.2d 310 (1990) in the Sixth Circuit and Fox Valley & Vicinity Constr. Workers Pension Fund v. Brown, 897 F.2d 275 (en banc), cert. denied, 498 U.S. 820 (1990) in the Seventh Circuit, is totally misplaced. Neither of those decisions involves an antenuptial agreement; both concern divorced spouses as to whom the explicit ERISA non-waiver rules intended to protect surviving spouses do not apply. Most importantly, neither case involves the statutory provisions which are controlling in this case.

The issue in the Fox Valley case was whether a divorced spouse who had been designated as a beneficiary prior to divorce may still receive death benefits despite a waiver in the divorce settlement agreement. As the Second Circuit indicated in commenting on the inapplicability of Fox Valley to this case, a divorced spouse is not protected by these ERISA statutory provisions and thus validly can waive benefits

without complying with the statutory requirements that apply to current spouses[6] (Pet. at 14a).

Petitioner's reliance on McMillan v. Parrott, 913 F.2d 310 (6th Cir. 1990), is similarly in error, if not misleading. McMillan does not even remotely suggest that a current spouse's statutory right to death benefits can be waived or otherwise compromised unless the spouse consents thereto in a manner fully consistent with the strict ERISA and IRC statutory requirements. In McMillan, the only issue presented to the court was the determination of the proper beneficiary of benefits as to which the ERISA and IRC spousal benefit rule did not apply. In McMillan, the surviving spouse was entitled under the specific kind of ERISA plans involved to only half the proceeds in the absence of a valid waiver. The district court had granted partial summary judgment and awarded the surviving spouse all of the proceeds of the ERISA plans that were owing to her under the federal spousal benefit rule (i.e., 50% of the account balance), notwithstanding the fact that the designation on file with the plan administrator indicated that another person (a former spouse) was entitled to this portion of the proceeds. McMillan, supra,

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[6] Moreover, petitioner's attempt to equate ERISA treatment of current spouses with ERISA treatment of divorced spouses totally ignores the statutory protection afforded divorced spouses when the divorce settlement provides for a qualified domestic relations order ("QDRO"). 29 U.S.C. § 1056(d)(3); IRC § 401(a)(13)(B).

913 F.2d at 311. That part of the district court ruling was not even appealed to the Sixth Circuit. What was appealed and what is the sole subject matter of the Sixth Circuit's decision in McMillan is the effect of a beneficiary designation filed with the plan administrator on the portion of plan proceeds that was not governed by the spousal benefit rule in a situation in which the plan participant had subsequently indicated an intent to change such beneficiary designation. Id. In the case at bar, which deals with a profit sharing plan described in IRC § 401(a)(11)(B)(iii) and ERISA § 205, all the proceeds of the plan are subject to the spousal benefit rule. Consequently, the Sixth Circuit decision in McMillan is inapposite.

In addition, the McMillan holding presupposes an effective beneficiary designation; in the case at bar, the designation of petitioner as beneficiary under the Plan was ineffective as against respondent because it was by its own language as well as by operation of law subject to the proviso that the surviving spouse would be the beneficiary unless the appropriate spousal consent form was obtained. Indeed, in a case arising two years later, the Sixth Circuit did not even cite to McMillan in holding that both a prenuptial agreement and an ineffective beneficiary designation did not constitute a valid

spousal waiver. Howard v. Branham & Baker Coal Co., supra.[7]

III

PETITIONER'S REMAINING ARGUMENTS ARE WITHOUT MERIT

A. The Beneficiary Designation Upon Which Petitioner Relies is No Longer Valid and is Not Binding on Respondent

Petitioner asserts that he is entitled to the proceeds of the Plan by virtue of the beneficiary designation signed in 1988 in connection with the deceased's divorce from his second wife (Pet. at 11). But, as the statutory language makes clear, that beneficiary designation is not binding upon respondent. ERISA and the IRC both mandate that such a consent is not

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[7] The only case that reached a decision contrary to the circuit and district court holdings in this case, and all of the other federal cases, is an intermediate state appellate decision, In re Estate of Hopkins, 214 Ill. App. 3d 427, 574 N.E.2d 230, appeal denied, 141 Ill. 2d 452, 580 N.E. 2d 115 (1991), which held, relying on a misreading of Fox Valley, that an antenuptial agreement did operate as an effective waiver of spousal benefits under ERISA (Pet. at 13a-14a, 27a). As the courts below held in the instant case, Hopkins was erroneously decided because it disregarded ERISA's explicit requirements for waiver by a current surviving spouse (holding in effect that it was irrelevant that the antenuptial agreement was signed before marriage, and holding that the Treasury Regulations cited above were erroneous or in any event not binding) (Pet. at 13a-14a, 27a). Furthermore, the Hopkins case interpreted the waiver requirements as they existed prior to the time that the statute was amended to require that the spouse's consent include a designation of beneficiary. Thus, the Illinois court was attempting to apply a predecessor statute to the one which the Regulations were promulgated to interpret.

binding on a subsequent spouse. As ERISA § 205(c)(2) provides:

> Any consent by a spouse (or establishment that the con-sent of a spouse may not be obtained) under the preceding sentence shall be effective only with respect to such spouse.

IRC § 417(a)(2) contains an identical provision.

Similarly, Treasury Regulation § 1.401(a)-20 also provides that if a participant's spouse consents to a waiver of a benefit (as the deceased's second wife did in this case), a subsequent spouse, i.e., respondent, is not bound by such consent:

> Q-29: If a participant's spouse consents under § 417(a)(2)(A) to the participant's waiver of a survivor annuity form of benefit, is a subsequent spouse of the same participant bound by the consent?
>
> A-29: No. A consent under § 417(a)(2)(A) by one spouse is binding only with respect to the consenting spouse.

Finally, the consent and the beneficiary designation on which petitioner relies contains an express acknowledgment signed by the deceased that:

> I understand that if I am married at the time of my death, my surviving spouse will receive the surviving spouse's death benefit from the Plan(s) as required by law UNLESS she/he has completed and signed the Spousal Consent below and has had

such Consent witnessed by a Notary Public or the Plan Administrator.

Similarly, the Plan language specifically states that the surviving spouse is the one who shall receive benefits under the Plan. See supra, p. 11 of this brief.

B. The Internal Revenue Service Regulations Constitute a Reasonable Interpretation of the Statute, and Accordingly Should be Followed. Indeed, These Regulations Provide Strong, Directly-On-Point Support for the Decisions Below in This Case

Treasury regulations "'must be sustained unless unreasonable and plainly inconsistent with the revenue statutes'" and "'should not be overruled except for weighty reasons.'" Bingler v. Johnson, 394 U.S. 741, 750 (1969) (quoting Commissioner v. South Texas Lumber Co., 333 U.S. 496, 501 (1948)). The "'choice among reasonable interpretations is for the Commissioner, not the courts.'" Commissioner v. Engle, 464 U.S. 206, 224 (1984) (quoting National Muffler Dealers Assn., Inc. v. United States, 440 U.S. 472, 488 (1979)).

All three Treasury Regulations relevant to this matter are contained in Regulations § 1.401(a)-20. They are directly on point, are entitled to great weight, and establish that there has not been an effective waiver or consent in this case. The first, Q and A-28, supra, specifically provides that consent in an antenuptial agreement or similar contract entered into prior

to marriage does not satisfy the consent requirements of IRC §§ 401(a)(11) and 417. Q and A-29, supra, covers the situation in which a spousal consent has been signed by a spouse who predeceases or divorces the participant (as it was by the deceased's second wife in this case), and provides that such consent is binding only upon the consenting spouse, and not upon a subsequent spouse. Finally, Q and A-32, supra, makes it clear that, as the statutes provide, a waiver and consent "must state the specific nonspouse beneficiary who will receive such benefit."

These regulations have been specifically upheld by the Circuit and the District court in this case and also by the courts in Nellis v. Boeing Co., supra, 1992 U.S.Dist LEXIS 8510 at *5 and Zinn v. Donaldson Co., supra, 799 F. Supp. at 73. It is clear that the regulations in this case are neither unreasonable, plainly inconsistent, nor in the least bit inconsistent with the statutory language. The plain language of the statute permits consent or waiver only by a "spouse", not by a fiancee. Moreover, the specific statutory language involved in the pertinent ERISA and IRC sections mandates that a spousal consent by a prior wife is not binding upon a subsequent spouse. See ERISA § 205(c)(2)(A) and IRC § 417(a)(2).

Petitioner cites to Hisquierdo v. Hisquierdo, 439 U.S. 572 (1979) and contends that "[t]he regulation should not be given weight because it constitutes a drastic interference with

the states' powers to regulate domestic relations where the words of the statute do not require such interference." (Pet. at 22). However, this contention overlooks the broad reach of ERISA's preemption clause, under which pension plan regulation is made an exclusively federal concern. Pilot Life Ins. Co. v. Dedeaux, supra, 481 U.S. at 44-46. Furthermore, Hisquierdo itself held that, under the Supremacy Clause of the Constitution, a state was precluded from applying its community property rules to award a divorcing wife an interest in certain federal statutorily-protected retirement benefits. Hisquierdo v. Hisquierdo, supra, 439 U.S. at 591.

Petitioner's hyperbolic claim that the regulations abrogate all antenuptial agreements and thereby "sweep aside the domestic relation laws of fifty states" (Pet. at 15) misconstrues both the scope and impact of such agreements. Clearly, whether or not antenuptial agreements are binding on ERISA benefit plans, antenuptial agreements and the state domestic relation laws regulating such agreements have broad applications to all non-benefit assets. Further, an antenuptial agreement such as the one in this case preserves the right of each party to dispose of that party's property in the manner he or she chooses. In this case, the deceased did nothing to change the entitlement of his surviving spouse to the plan benefits upon his death. The beneficiary designation signed prior to the execution of the antenuptial agreement became

null and void upon his remarriage, as the designation form and the Plan documents both provide with unmistakable clarity. The antenuptial agreement did not designate a beneficiary for any benefits payable after death, nor did the deceased take any steps, after his marriage to respondent, to designate petitioner as the beneficiary of any post-death benefits. Under these circumstances, petitioner's position appears to rest on the misguided notion that an antenuptial agreement should act as an absolute bar to the receipt by the surviving spouse of any property from the deceased spouse.[8]

C. The Antenuptial Agreement Does Not Contain a Specific Beneficiary Designation Nor Does It Conform to the Limited Exception to That Requirement

Petitioner asserts that the antenuptial agreement complied "with the intent" of the general consent requirement of Section 205(c)(2)(A)(ii) of ERISA (Pet. at 19) and faults the courts below for "insist[ing] on literal compliance with the terminology of the statute." (Pet. at 17). This desperate argument flies in the face of the clear Congressional intent to protect spousal rights and to limit waivers of such rights to the circumstances described in exacting detail in the statute.

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[8] Indeed, as previously noted, see, supra, p. 9, fn. 4 of this brief, the Second Circuit was able to find, as indeed it had to, that this antenuptial agreement did not conform to the ERISA statutory requirements, even though the Court reserved judgment as to whether an antenuptial agreement could under any circumstances satisfy the statutory waiver requirements.

As quoted above, under Section 205(c)(2)(A) of ERISA, in order to be effective, not only must a spousal consent acknowledge the effect of such election on the spouse (a requirement set forth in Section 205(c)(2)(A)(iii)), but the election by the participant to which the consent relates must also "designate a beneficiary . . . which may not be changed without spousal consent (or the consent of the spouse expressly permits designations by the participant without any requirement of further consent by the spouse)." ERISA § 205(c)(2)(A)(ii). In other words, under the statute, in order for a waiver to be effective, the spouse must not only understand that he or she is relinquishing a statutory right to a plan benefit, but must also make an informed choice regarding the identity of the party who will receive the benefit in his or her stead. The reason for this last requirement is quite obvious: a spouse might very well be willing to relinquish plan rights in favor of a particular individual, such as a child, but not to others.

Recognizing this, the statute sets forth the general rule, i.e., an election is not valid unless there is a specific beneficiary designation. A very limited exception to this rule is created by the parenthetical clause of Section 205(c)(2)(A)(ii), under which a spousal consent will not be invalid for failure to specify a beneficiary, if, and only if, the spouse acknowledges that he or she could have limited the consent to a

particular beneficiary, but instead has decided to give a general consent. The Report of the Committee on Finance of the United States Senate accompanying H.R. 3838, S. Rep. No. 313, 99th Cong., 2d Sess. (1986), at p. 1098, explains this rule as follows: Under the statute, "a spouse's consent to waive [his or her rights] is not valid unless the consent (1) names a designated beneficiary who will receive any survivor benefits under the plan . . . or (2) acknowledges that the spouse has the right to limit consent only to a specific beneficiary . . . and that the spouse voluntarily elects to relinquish . . . such right."[9]

Neither the antenuptial agreement nor any other document executed by respondent meets this simple and clear statutory requirement. Petitioner cannot point to any instance where respondent consented to a specific beneficiary designation or acknowledged that she has the right to limit her consent to a specific beneficiary and nonetheless voluntarily elects to relinquish such right. Consequently, in addition to the other reasons set forth, the purported waiver of respondent's rights to the plan benefits is ineffective for failure to satisfy Section 205(c)(2)(A)(iii) of ERISA.

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[9] See also Joint Committee on Taxation, Explanation of Technical Correction to the Tax Reform Act of 1984 and Other Recent Tax Legislation at pp. 216-217 and Treas. Reg. § 1.401(a)-20, Q&A 31 which explain this rule in the same way.

D. The Legislative Intent/Legislative History Arguments

Petitioner strives to avoid the plain meaning of the ERISA and IRC spousal waiver statutes by contriving a version of legislative intent and history which he claims is thwarted by the decisions below (Pet. at 17). However, the legislative intent and legislative history of the ERISA and IRC spousal waiver sections are inapplicable in view of the clear, unambiguous and unmistakable language of the statutes. Furthermore, even if the legislative intent and history were to be deemed applicable, they uncontrovertibly support the decisions reached below.

1. Legislative Intent and History are Inapplicable

Where the language of a statute is unambiguous, a court should not resort to legislative history in interpreting it. This Court's recent holding in West Virginia University Hospitals, Inc. v. Casey, ___ U.S. ___, 111 S. Ct. 1138, 113 L.Ed. 2d 68, 83 (1991) is illustrative:

> [T]he purpose of a statute includes not only what it sets out to change, but also what it resolves to leave alone. The best evidence of that purpose is the statutory text adopted by both Houses of Congress and submitted to the President. Where that contains a phrase that is unambiguous -- that has a clearly accepted meaning in both legislative and judicial practice -- we do not permit it to be expanded or contracted by the statements of individual legislators or committees during the course of the enactment process. (Citations omitted).

Petitioner does not and indeed cannot point to any phrase of the relevant statutes which is even remotely ambiguous. The language of the statutes is microscopically clear in meticulously setting forth the three-part test for a valid spousal waiver. Petitioner instead resorts to legislative history, not for its proper use of resolving ambiguities, but rather to piecemeal together a version of Congressional intent which petitioner claims is frustrated by the decisions of the courts below.

This Court's holding in Norfolk & Western Railway Co. v. American Train Dispatchers Ass'n, ___ U.S. ___, 111 S. Ct. 1156, 1163, 113 L.Ed. 2d 95, 106 (1991) is controlling in the case at bar. In that case, the Court considered whether an exemption of a carrier from the antitrust laws and "all other law" included a carrier's legal obligations under a collective-bargaining agreement.

> As always, we begin with the language of the statute and ask whether Congress has spoken on the subject before us. "If the intent of Congress is clear, that is the end of the matter; for the court . . . must give effect to the unambiguously expressed intent of Congress." The contested language . . . is clear, broad, and unqualified. It does not admit of the distinction the Court of Appeals drew, based on its analysis of legislative history. . . (Citations omitted).

This Court, in reversing the Court of Appeals in Norfolk, once again emphasized that a court should not

analyze the legislative history when the contested language of the statute is clear, broad and unqualified. Since the language of the statutes at issue in the case at bar is patently clear, broad, unqualified and unambiguous, this Court should give such language its plain meaning which ineluctably leads to the conclusions reached below, namely that the antenuptial agreement does not constitute a valid spousal consent and therefore the Plan proceeds must be paid to respondent, as surviving spouse.

2. Even if Deemed Applicable, Legislative Intent and History Support the Decisions Reached Below

Even if this Court were to consider the legislative intent and legislative history of the ERISA and IRC spousal waiver sections, it should still find such intent in harmony with the result reached below.

Petitioner would have us believe that Congress never considered the impact of the spousal consent rules upon antenuptial agreements. Significantly, the spousal consent rules were introduced into ERISA and the Internal Revenue Code by the Retirement Equity Act of 1984, the same Act that incorporated the QDRO rules -- a comprehensive scheme governing pension rights at the conclusion of a marriage -- into ERISA and the IRC. See ERISA § 206(d)(3) and IRC §§ 401(a)(13) and 414(p). Clearly, then, Congress recognized the instability of the family unit and enacted specific legislation to deal with this fact of life -- particularly in the benefit

plan area, where it deemed it appropriate to do so. Moreover, in the same year that the spousal consent legislation was enacted, special legislation dealing with the gift tax ramifications of marital agreements was enacted. See IRC § 2516. Nonetheless, petitioner would have us believe that Congress did not know how to clearly draft legislation that specifically addresses the special tax and ERISA problems attendant upon marriage status changes, even though Congress had, in petitioner's view, intended to do so.

In fact, Congress' silence on this issue leads to the very opposite conclusion, namely, that Congress did not want to compromise the spousal rights that it was creating. Because Congress formulated detailed, precise spousal waiver requirements, the proper implication is that Congress did not want a spouse's right to a participant's plan benefit to be lost or otherwise compromised unless the specific requirements enumerated in the statute are met.

One possible reason why Congress chose to restrict effective antenuptial waivers was its concern not to unduly burden plan fiduciaries. Administrative ease and convenience were important goals of Congress in enacting the statutory framework. See, e.g., Fox Valley & Vicinity Construction Workers Pension Fund v. Brown, supra, 897 F.2d at 283.

> ERISA is full of unyielding rules, designed to simplify administration. Rules have their flaws; loopholes and overbreadth, both producing unpalat-

> able outcomes in the event of unanticipated circumstances, are among them. But whether to have rules (flaws and all) or more flexible standards (with high costs of administration and erratic application) is a decision already made by legislation. Congress and pension plans elected to use rules rather than standards; patterns of avoidance mean that we transmute the approach Congress chose into the one it rejected. (Dissenting opinion).

See also H.R. Rep. No. 655, 98th Cong., Pt. 1 at 25 (1984) (it was important to Congress to achieve its aims without imposing unnecessary or unreasonable costs on pension plans). If antenuptial waivers were to be given effect, plan administrators would have to wade through long and, in many instances, complex documents, to determine what impact, if any, such documents have on the payment of plan benefits.

In addition, Congress might also have been concerned that creating additional exceptions to the spouse's absolute right to plan benefits would dilute its effect by unintentionally creating situations in which the spouse would really need and deserve plan benefits but would fail to receive them.[10] Stated differently, because of the significant social policies motivating the enactment of this legislation, Congress pre-

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[10] This could happen, for example, if a woman signed an antenuptial agreement at a young age, married an individual who subsequently participated in a plan for forty or so years while the spouse took care of the family at home without accruing her own pension benefit. If the husband died and the antenuptial agreement were given effect, the wife would be left with nothing.

ferred to provide augmented rights to spouses of plan participants -- even to brand-new spouses and other spouses who would not necessarily need these rights -- rather than providing more narrow relief that might leave deserving or needy spouses unprotected.

Whatever the reason, the plain fact is that if Congress had intended to limit protection of a wife's right to her husband's retirement benefits to only those benefits vesting or accruing after the marriage begins (as petitioner seems to argue)[11] or otherwise give preferential treatment to antenuptial agreements, then Congress could easily have devised a mechanism to do so. Despite its intricate safeguards regarding the form and substance of a spousal waiver, the statutes make no distinction whatsoever between benefits vesting or accruing before as opposed to after marriage and do not provide elevated status to antenuptial agreements. In light of this deafening statutory silence, it would be totally inappropriate to conclude that any such distinction should be made.

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[11] See Pet. at p. 16 ("The purpose of this legislation was to protect the benefit rights of surviving spouses who made a contribution during marriage from loss of benefits under plans built up during a marriage. S. Rep. No. 575 reprinted in 1984 U.S. Code Cong. & News [USCCAN], at pp. 2547 & 2558.") (Emphasis added). Yet the given citation, and indeed the entire Congressional Report, makes no such distinction between pre- and post-marital benefits. Nor do the statutes, or the Treasury Regulations.

CONCLUSION

The petition for a Writ of Certiorari should be denied.

Dated: April 21, 1993

Respectfully submitted,

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No. 92-1572

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

PETER HURWITZ,

Petitioner,

vs.

JOAN LEAR SHER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR THE PETITIONER

In our petition, we demonstrated that the Courts of Appeal are divided over whether to give effect to beneficiary designations that have been filed with ERISA benefit plan administrators. The respondent appears to concede that the Sixth and Eighth Circuits give controlling effect to beneficiary designations on file with plan administrators [Howard v. Branham & Baker Coal Co., 968 F.2d 1214 (table), No. 91-5913, 1992 U.S. App. LEXIS 16247 at 9-10 (6th Cir. 1992) (unfiled beneficiary designation not effective);

McMillan v. Parrott, 913 F.2d 310 (6th Cir. 1990) (benefits awarded to last designated beneficiary); Lyman Lumber Co. v. Hill, 877 F.2d 692 (8th Cir. 1989) (same)], while the Seventh and Second Circuits give no effect to such beneficiary designations. [Hurwitz v. Sher, 982 F.2d 778 (2d Cir. 1992) (designation of beneficiary ignored); Fox Valley & Vicinity Constr. Workers Pension Fund v. Brown, 897 F.2d 275 (7th Cir.) (en banc), cert. denied, 498 U.S. 820 (1990) (same)]. Nor does respondent dispute that the Second and Seventh Circuits maintain differing requirements for a valid waiver of spousal benefits under ERISA. Instead, respondent relies upon limited factual distinctions in asking this Court not to resolve the conflicting legal principles evident in the decisions of the Circuit courts. Because the validity of beneficiary designations under ERISA varies from jurisdiction to jurisdiction, certiorari should be granted to ensure uniformity of federal law in this important area.

I. Respondent Has Failed to Harmonize the Conflicting Decisions of the Courts of Appeal

Respondent's attempt to distinguish the decisions in McMillan and Fox Valley by arguing that these cases concerned divorced spouses "as to whom the explicit ERISA non-waiver rules intended to protect surviving spouses do not apply" (Br. in Opp. at 13) is unpersuasive. Respondent fails to cite any statutory provision or legislative history for her argument that the benefit waiver provisions of ERISA, 29 U.S.C. § 1055(c)(2)(A)(ii), do not apply to divorced spouses. Indeed, such a conclusion would be entirely inconsistent with the legislative purpose of protecting spousal contributions to the creation of retirement benefit plans. See Petition at 16. Moreover, in the McMillan and Lyman Lumber cases it was not the fact of divorce, but the fact that the ex-spouse was the last designated beneficiary, that was the basis for the

Courts of Appeals' decisions. Thus the fact of divorce does not lessen the conflict among the circuits as to whether or not plan administrators should follow beneficiary designations that have been filed with them.[1]

II. Respondent Has Distorted the Meaning of the Unambiguous Statutory Language in Contending that the Antenuptial Agreement Did Not Constitute General Consent to Designation of Non-spouse Beneficiaries

Respondent has transmuted the plain meaning of 29 U.S.C. § 1055(c)(2)(A)(ii) (1988) in a desperate effort to overcome the Second Circuit's error in ignoring the general consent provision of this statute. ERISA provides that a spouse may waive his or her spousal benefits in a writing which "expressly permits designation by the participant without any requirement of further consent by the spouse . . ." 29 U.S.C. § 1055(c)(2)(A)(ii). Under this provision -- which the Second Circuit Court of Appeals disregarded altogether (Pet. at 8a) -- there was no requirement that the spouse's consent designate a beneficiary. Under Treas. Reg. § 1.401(a)-20, Q&A 32(b) and the plan itself, the only party required to designate a beneficiary was the plan participant. His designation as well as the antenuptial consent were on file with the administrator.

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[1] Respondent's attempt to distinguish McMillan on its facts (Br. in Opp. at 14-15) is unsuccessful. The Sixth Circuit's reasoning in both McMillan and Howard clearly bases its decisions on the documents on file with the plan administrator. Nor were the "QDRO" provisions of ERISA (29 U.S.C. § 1056(d)(iii)) the basis for any of the decisions that are in conflict.

In order to argue that the antenuptial agreement did not comply with Section 1055(c)(2)(A)(ii), respondent has sought to re-write the statute. Respondent contends that Section 1055(c)(2)(a)(ii) requires that a spouse "acknowledge that she has the right to limit the consent to a specific beneficiary and nonetheless voluntarily elects to relinquish such a right." (Br. in Opp. at 23). Such a requirement does not appear anywhere in the statute. Neither the statute nor the profit-sharing plan at issue requires such an acknowledgement of rights in a general consent.[2] Indeed, the plain terms of the statute require only that the spouse give general consent to beneficiary designations by the plan participant -- i.e., "consent to designations by the participant without any requirement of further consent by the spouse . . ." 29 U.S.C. § 1055(c)(2)(A)(ii). Respondent, in short, has sought to increase the number of requirements in the statute in order to argue that her antenuptial agreement is incomplete.

By disregarding the general consent provision in the parenthetical clause in Section 1055(c)(2)(A)(ii), the Court of Appeals has effectively invalidated interspousal agreements concerning benefit plan assets that rely on general consent. Respondent virtually concedes that under her view antenuptial agreements cannot be applicable to ERISA benefit plans. (Br. in Opp. at 20). This Court should grant certiorari in order to determine whether, given the plain language of

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[2] Respondent has deliberately interjected into Section 1055(c)(2)(A)(ii) the separate requirement of sub-part (A)(iii) that the spouse acknowledge the effect of a decision to waive spousal benefit rights. See 29 U.S.C. § 1055(c)(2)(A)(iii). If Congress had intended the general consent clause to require an acknowledgement of rights, it would have said so.

ERISA's clause permitting general consent to designation of non-spouse beneficiaries, the Courts of Appeal are correct in sweeping aside state-sanctioned antenuptial agreements that preserve beneficiary designations from prior marriages.

CONCLUSION

For the foregoing reasons, and those set forth in the Petition, petitioner respectfully prays that a writ of certiorari be granted.

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